IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date : 10-11-2004

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THE HONOURABLE MR.JUSTICE P.D. DINAKARAN
AND
THE HONOURABLE MR. JUSTICE T.V. MASILAMANI

O.S.A. Nos.148 and 149 of 2000

O.S.A.No.148 of 2000

L.H.Vidyapoornan ...Appellant

-Vs.-

1. L.H.Premavathy
2. L.H.Padmavathy
3. L.H.Parijatham
4. L.H.Venkataraman
5. L.H.Krishnan ...Respondents

O.S.A.No.149 of 2000

L.H.Vidyapoornan ...Appellant

-Vs.-

1. L.H.Padmavathy
2. L.H.Parijatham
3. L.H.Premavathy ...Respondents

Original Side Appeals against the common judgment and decrees dated 24.12.1998 passed by the learned Single Judge of this Court in C.S.No.522 of 1992 and T.O.S.No.31 of 1998 respectively.

For Appellant : Mr.T.Viswanatha Rao in both Appeals.

For R1 in OSA 148/00 &
R.3 in OSA.149/00 : Mr.R.Raghavan

For R3 in OSA.148/00 & : Mr.F.X.A.F. Denny for
R2 in OSA.149/00 Mr.P.Chandrasekaran

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For R2 in OSA.148/00 &
For R.1 in OSA.149/00 ..Mr.V.Umapathy

J U D G M E N T

(Judgment of the Court was delivered by
T.V. Masilamani, J)

The appellant in O.S.A.No.148 of 2000 is the 5th defendant in the suit in C.S.No.522 of 1992 and the respondents 1 to 5 are the plaintiff and the defendants 1, 2, 4 and 6 respectively.

The appellant in O.S.A.No.149 of 2000 is the plaintiff in T.O.S.No.31 of 1998 (5th defendant in C.S.No.522 of 1992) and the respondents 1 to 3 are the defendants 1 to 3 in T.O.S.No.31 of 1998 (defendants 1, 2 and plaintiff in C.S.No.522 of 1992) respectively.

2. Since the learned Single Judge tried both the suits jointly after recording evidence in C.S.No.522 of 1992 and treating the same as the evidence in the other suit also, the parties and witnesses referred to in C.S.No.522 of 1992 are referred to hereunder as they were referred to in the judgment rendered by the learned Single Judge for the sake of convenience. Thus, the common judgment is pronounced with reference to these appeals.

3. The plaintiff in C.S.No.522 of 1992 filed the suit for partition and separate possession of 1/7th share in item Nos.1 to 4 of 'A' schedule and 1/4th share in gold ornaments, silver articles and other articles mentioned in the plaint 'B', 'C' & 'D' schedule. Similarly, the 5th defendant in the said suit filed the suit in T.O.S.No.31 of 1998 on the basis of Ex.B-1, the last will and testament executed by his mother Kamalammal to grant letters of administration in his favour. The learned Single Judge, having anlysed the evidence, both oral and documentary adduced on either side and upon hearing both sides, granted a decree for partition in respect of 1/6th share in the properties left behind by the parents of the plaintiff and consequently, dismissed the suit filed by the 5th defendant on the basis of the will executed by his mother. Hence, the 5th defendant has preferred these appeals as against the common judgment and decrees passed in the said suits by the learned Single Judge.

4. The contentions of the first respondent in O.S.A.No.148 of 2000 (plaintiff in C.S.No.522 of 1992) in the plaint are briefly stated as follows:-

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(a) The plaintiff and the defendants 1 to 3 are the daughters and the defendants 4 to 6 are the sons of Harikrishnan and Kamalammal. Harikrishnan died intestate in the year 1958 and Kamalammal also died intestate on 24.11.1986. Item No.1 of the plaint 'A' schedule property was purchased by Harikrishnan and it belonged to him. Item Nos.2 to 4 of 'A' schedule and the gold ornaments and silver articles described in 'B' and 'C' schedule belonged to Kamalammal. She purchased item Nos.2 to 4 of plaint 'A' schedule out of her own funds and therefore they are her separate properties.

(b) The plaintiff and the defendants constituted a joint Hindu family and as legal heirs of Harikrishnan and Kamalammal, they are each entitled to 1/7th share in all the schedule mentioned properties and so far as gold jewels and silver articles are concerned, the plaintiff is entitled to 1/4th share and the balance is due to the defendants 2 to 6. The plaintiff is in joint possession and enjoyment of the suit properties. After the death of the mother in 1986, misunderstanding arose between the plaintiff and the others and therefore, the common enjoyment has become impossible. The plaintiff is residing in a portion of the residential house in item No.2 of 'A' schedule and the 5th defendant is residing in the first floor of the said house. The plaintiff issued a notice calling upon the defendants to divide the suit properties and put her in possession of her share and even though the defendants received the same, they have neither sent a reply nor complied with the demand.

(c) The tenants are residing in the 'A' schedule item No.1 and the 4th and 5th defendants are collecting the rents, but they are not accounting for the income from the said property. In the cultivable land described in item No.3 of the plaint 'A' schedule, the 5th defendant is collecting the lease amount from the tenant for the possession of the property. The gold ornaments weighing about 677.700 grams are also in the possession of the 4th and 5th defendants, after the death of Kamalammal and the plaintiff is entitled to her share in the said movable properties also. Hence, the suit.

5. The averments in the written statement filed by the appellant/5th defendant in C.S.No.522 of 1992 are briefly stated as follows:-

(a) The suit is not maintainable for the reason that no guardian was appointed to take care of the mentally retarded 3rd defendant. It is not true to say that Kamalammal died intestate as she had actually executed a Will dated 30.10.1986 with reference to the disposition of her properties and therefore the properties of Kamalammal have to be divided only in accordance with the terms of the Will. The mother had also left 125

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sovereign of gold jewels besides the other jewels which had been taken away by the plaintiff after the death of the mother and therefore the plaintiff has to be directed to bring those jewels also so as to make them available for partition as per the disposition made in the Will. It is not true to say that there is a joint family consisting of the plaintiff and the defendants.

(b) In so far as 'A' schedule item No.1 is concerned, it belonged to the father and the defendants 4 and 5 effected improvements on the same by spending huge amounts and hence they are entitled to equity while dividing the said item as their father died intestate. Therefore, the plaintiff and the defendants are entitled to equal shares along with their mother in the said item. The share of the mother in the said item as well as item Nos.2 to 4 belonging to her have to be dealt with under the Will.

(c) The plaintiff is in possession of 60 sovereign of gold jewels belonging to Kamalammal and they should also be made available for division as per the Will. There is no silver article available for partition. Jawa motor cycle mentioned in 'D' schedule is the separate property of the 5th defendant as he purchased it long back. The 5th defendant is in occupation of the first floor of the residential building in item No.2 with his family along with the 3rd defendant. The 4th defendant as the eldest son in the family is in possession of the title deeds and other documents as he is collecting the entire rents from the tenants in occupation of item No.1. The 4th defendant has redeemed the jewels which were pledged by his mother during her life time and as per the Will executed by the mother, the plaintiff is not entitled to any share in the properties. Therefore, the suit may be dismissed.

6. The 5th defendant in C.S.No.522 of 1992 has filed the O.P.No.378 of 1996 praying for letters of administration. Since the plaintiff in C.S.No.522 of 1992 filed an affidavit in the O.P. contesting the claim, the petition was ordered to be converted into testamentary suit and therefore it was taken on file as T.O.S.No.31 of 1998.

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7. The averments of the 5th defendant as petitioner/plaintiff in the said testamentary suit are briefly stated as follows:-

The last Will and Testament of the deceased Kamalammal was duly executed by her at her residence at No.12, Murugappa Mudali Street, Purasawakkam on 30.10.1986 in the presence of witnesses and out of two witnesses, one died and the other one is available. The plaintiff being one of the sons of the deceased

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testator is also one of the beneficiaries under the Will referred to above. There was no application filed in any District Court or in the High Court for probate of any Will of the said deceased. The testator having executed her last will on 30.10.1986, handed over the same to the plaintiff and died subsequently on 24.11.1986. In view of her intention expressed in the Will, in the event of any dispute among the heirs, the Will has to be produced before this Court for implementation. One of the sisters of the plaintiff has filed the suit in C.S.No.522 of 1992 in this Court seeking the relief of partition of the family properties including the properties mentioned in the Will and therefore the plaintiff is constrained to take steps to probate the Will by producing the same in the Court. Hence, the suit.

8. The contentions of the defendants 1 and 3 to 5 in their written statements filed in T.O.S.No.31 of 1998 are briefly stated as follows:-

(a) The plaintiff has not disclosed the existence of the Will till date. The attesting witnesses are strangers to his mother and therefore she would not have taken them as witnesses. The mother died on 24.11.1986 at Madras and she did not leave any Will as mentioned in the plaint. The sale deeds in favour of the mother in respect of the immovable properties were taken by the father benami and the real owner was the father of the defendants. Therefore the mother was holding the properties for the benefits of the family.

(b) The plaintiff has forged the Will after the death of the mother and long thereafter, the suit in T.O.S.No.31 of 1998 was filed. The mother of the defendants was an intelligent person having acquaintance with Advocate and therefore she could not have executed the alleged Will.

(c) The 5th and 6th defendants were living with the mother till her death and they were taking care of her welfare. The plaintiff in T.O.S. No.31 of 1998 did not disclose the execution of the Will till the defendants filed the written statement in the suit in C.S. No.522 of 1992. Therefore, it is clear that the plaintiff forged the document after the suit was filed and therefore the Testamentary Original Suit is liable to be dismissed.

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9. In view of the above pleadings and having regard to the facts and circumstances of the case, the learned Single Judge framed the following issues in C.S.No.522 of 1992:-

(1) Whether the suit as instituted against the third defendant, who is mentally ill is maintainable?

(2) Whether the schedule 'A' item No.1 property

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alone is the property left behind by late L.R.Harikrishnan?
(3) Whether item Nos.2, 3 & 4 to 'a' schedule belong to the plaintiff and defendants mother Kamalammal?

(4) If so, whether Kamalammal effected any testamentary disposition regarding these properties and therefore, they are not available for partition?

(5) Whether the late Kamalammal had pledged sixty five sovereign of jewels?

(6) Whether Kamalammal had made testamentary disposition regarding these jewels also?

(7) Whether any other family jewels are available for partition?

(8) Whether the plaintiff is in possession of sixty sovereigns of the jewels belonging to late Kamalammal?

(9) Whether the fifth defendant is in possession of 'C' schedule silver articles?

(10) Whether item No.1 to 'D' schedule, motor cycle is self acquisition of the fifth defendant?

(11) Whether item Nos.2 to 6 and 8 to 19 of the 'D' schedule properties are not available for partition?

(12) Whether the plaintiff is entitled to partition as prayed for?

(13) Whether defendants 4 and 5 are entitled to special equities?

(14) Whether the plaintiff is in joint possession of the suit properties?

(15) Whether court fee paid is incorrect?

(16) To what relief, if the parties are entitled?

10. Having analysed the evidence adduced and the arguments advanced by both sides, the learned Single Judge held under the said issues as follows:-

Issues (2), (5) and (6) in C.S.No.522 of 1992 and issue No.

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(1) in T.O.S.No.31 of 1998 were considered together and the learned Single Judge held in respect of the same that the suit 'A' schedule item No.1 belonged to Harikrishnan as his self-acquired property, that item Nos.2 to 4 in 'A' schedule belonged to Kamalammal, that the Will dated 30.10.1986 is not a true and genuine document, as it was not executed by Kamalammal as claimed by the 5th defendant in C.S.No.522 of 1992 and the plaintiff in T.O.S.No.31 of 1998.

11. In view of the above findings, the learned Single Judge held issue Nos.(1), (5), (7) to (15) as follows:-

On issue No.(1) it was held that since the 3rd defendant died during the pendency of the suit and inasmuch the plaintiff and other defendants have been recorded as legal representatives of the deceased 3rd defendant, the issue with reference to maintainability of the suit did not arise for consideration. Similarly, on issue No.(5), it was held that the 4th defendant was in possession of the jewels belonging to Kamalammal and since the same had been redeemed by him by discharging the mortgage created by the mother, all the legal heirs had to be given share in the same equally. On issue Nos.(7), (10) and (11), it was held that the motor cycle mentioned in 'D' schedule belonged to the 5th defendant absolutely. Further, it was held that the movable articles mentioned in 'D' schedule are not available for partition for the reason that they had already been divided between the plaintiff and the other brothers and sisters and therefore it is not available for partition. Similarly, it was held that the 5th defendant has not proved that the plaintiff has taken some of the jewels of the mother. Similarly, it was found on issue Nos.(13) to (15) that neither the 4th defendant nor the 5th defendant is entitled to any special equity for effecting improvement, that since the plaintiff is put in joint possession of the suit properties, the parties will be entitled to 1/5th share of the same and on issue No.(15) does not arise as no arguments is advanced on that point. Ultimately, the learned Single Judge held on issue No.(16) in C.S.No.522 of 1992 that the plaintiff is entitled to partition and separate possession of her 1/6th share in the suit properties and consequently, answered issue No.(2) in the Testamentary Suit that since the Will relied upon by the 5th defendant is neither true nor genuine, T.O.S.No.31 of 1998 is dismissed.

12. Though the 1st respondent/plaintiff originally filed the suit claiming 1/7th share, on account of the death of the 3rd defendant in the suit, namely, sister of the appellant and other respondents, the learned Single Judge rendered a finding that since she died intestate her 1/7th share has to be divided equally among the other six sharers. Therefore, the said decree was

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passed in view of the subsequent event to the effect that the 1st respondent/plaintiff is entitled to 1/6th share in the suit 'A' and 'B' schedule properties.

13. In the above circumstances, the learned counsel for the appellant has raised the following contentions in his arguments so as to sustain the appeals and they are briefly set out hereunder:-

(a) The learned Single Judge ought to have held that except for item No.1 of the suit 'A' schedule, the other items belonged to the mother who has made testamentary disposition under the Will, Ex.B-1 and therefore, the learned Single Judge ought to have dismissed the suit for partition and decreed the testamentary suit filed by the appellant.

(b) On the basis of the evidence adduced the learned Single Judge ought to have upheld the genuineness and validity of the Will, Ex.B-1 executed by the mother and consequently, decreed the testamentary suit.

(c) Similarly, the suit against the 3rd defendant, mentally ill person, without proper representation by a guardian duly appointed by the Court ought to have been dismissed and therefore the finding rendered by the learned Single Judge in this respect is unsustainable in law.

(d) The procedure adopted by the learned Single Judge in the disposal of the suit for partition and the testamentary suit is not valid and proper for the simple reason that the testamentary suit should have been disposed of in the first instance and thereafter the suit for partition ought to have been tried by the learned Single Judge.

(e) The learned Single Judge ought to have made distinction with reference to the property inherited by the family from the father and the properties admittedly belonging to the mother and therefore, the finding rendered without such distinction and also granting equal share to all parties to the suit is not sustainable in law.

(f) The suit is bad for partial partition for the reason that the other properties like jewels of larger quantity were omitted to be added in the plaint schedule.

(g) The finding of fact rendered by the learned Single Judge that the plaintiff was in joint possession of the suit property along with other members of the family is against the evidence on record and therefore the plaintiff is not entitled to claim any share in the suit property.

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(h) The learned Single Judge was wrong in concluding that the 2nd defendant who was practising as a Doctor was giving her income for maintaining the family, but on the other hand, it is the defendants 4 and 5 who were contributing their income for the maintenance of the family, as the 2nd defendant had not even completed her study at that time. Similarly, they have also enhanced the value of the property by improvement after the demise of the mother.

Hence, the judgment and decrees dated 24.12.1989 passed in C.S.No.522 of 1992 and T.O.S.No.31 of 1998 have to be set aside and the appeals allowed.

14. In the above circumstances, the following issues arise for consideration in these appeals:-

(i) whether the suit as instituted by the 1st respondent/plaintiff is not maintainable for any of the reasons urged before this Court by the appellant?

(ii) Whether the suit items 2, 3 & 4 to 'A' schedule belonged to Kamalammal, the mother of the plaintiff and the defendants and if so, in view of the testamentary disposition made by her under the Will dated 30.10.1986, the said items are not available for partition?

(iii) Whether the said Will dated 30.10.1986 was executed by Kamalammal in a sound and disposing state of mind as claimed by the appellant herein and if so, whether he is entitled to letters of administration in respect of the said Will?

(iv) Whether the appellant/5th defendant is entitled to get item No.2, house property described in 'A' schedule to the plaint and the land measuring 50 cents in item No.3 measuring 2.20 acres as described in schedule 'A' to the plaint towards 1/6th share besides his 1/6th share in the plaint 'B' schedule movable properties. If so, to what equitable relief is he entitled?

15. Point No.(i): The relationship between the parties to the suit, the plaintiff and the defendants 1 to 6, is not in controversy. Similarly, it is not disputed that the father of the plaintiff and the defendants, Harikrishnan died intestate in the year 1958 and their mother Kamalammal died on 24.11.1986. The admitted case of both parties is that item No.1 of 'A' schedule property was purchased by the father Harikrishnan and item Nos.2

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to 4 of 'A' schedule and the gold ornaments described in 'B' schedule belonged to the mother Kamalammal who purchased items 2 to 4 from her own funds and accumulated other movable properties as her separate properties. As the plaintiff and the defendants constituted a joint Hindu family, originally the suit was filed by the plaintiff claiming 1/7th share in the suit properties. On the contrary, the 5th defendant who is the appellant herein filed the testamentary suit on the basis of the Will dated 30.10.1986 alleged to have been executed by Kamalammal in a sound and disposing state of mind. It has therefore become necessary to dispose of both the suits by a common judgment rendered by the learned Single Judge which is now under challenge in these appeals.

16. The first contention of the learned counsel for the 5th defendant in these appeals is that the suit instituted by the plaintiff for partition is not maintainable for the reason that the mentally ill person, namely, the 3rd defendant was not represented by any guardian appointed by the Court in the suit, while it is admitted even in the evidence of the plaintiff as P.W.1 that the 3rd defendant was suffering from mental retardation.

17. Per contra, the learned counsel appearing for the respondents would submit that since subsequent to the filing of the suit, the 3rd defendant died intestate in 1997, the question of maintainability of the suit on account of failure to appoint a guardian for her person and property did not arise for consideration and therefore it is urged that the issue regarding the maintainability on that account was not germane for consideration. In this context, it is necessary to advert to the evidence of P.W.1, the plaintiff herself that the 3rd defendant, while employed as an auditor in the Accountant General office, was suffering from hallucination and that she used to talk incoherently and some times behaved in an odd manner and she used to go out of the house very often. Further she would contend that subsequent to the death of her mother Kamalammal on 24.11.1996, it was her brother, the 5th defendant who took care of the 3rd defendant and that even though such facts were known to her before filing of the suit, she failed to bring forth the same in her plaint. It is in these circumstances, this Court is of the considered view that the finding of the learned Single Judge that the lapse on the part of the plaintiff in getting the guardian appointed through court for the person and property belonging to the mentally ill 3rd defendant has become academic in view of the demise of the 3rd defendant pending disposal of the suit. In view of the above circumstances, we confirm such finding rendered by the learned Single Judge on the above aspect of the matter.

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18. Similarly, the next contention put forth by the defendants to the effect that the plaintiff is not entitled to maintain the suit as she was not in joint possession of any of the property mentioned in the plaint schedules can have no bearing on the issue for the simple reason that even as per the admitted case of the defendants, the father Harikrishnan died intestate leaving behind his self-acquired property, namely, item No.1 to the plaint 'A' schedule and therefore it follows that the plaintiff should be presumed to have been in joint possession of the said item till the property is divided by metes and bounds in accordance with the rights of the parties entitled to succeed to the property. In any view of the matter, since the plaintiff claims a share in all the items of the schedule mentioned properties dehors the alleged Will dated 30.10.1986 executed by Kamalammal, she should be presumed notionally that she has been in possession and enjoyment of the joint family properties along with other members. For the reasons stated above, we are of the opinion that the contention of the defendants that the suit is not maintainable cannot be countenanced. Hence, the issue is found in favour of the plaintiff.

19. Point Nos (ii) & (iii): The propounder of the Will Ex.B-1 is the 5th defendant who is the appellant in this appeal. According to him, the Will was executed by Kamalammal while she was in a sound and disposing state of mind and as per the Will, all the immovable properties and jewels had been bequeathed in favour all the three sons, defendants 4 to 6 excluding the daughters. The plaintiff as P.W.1 has stoutly denied the existence of the Will as the 5th defendant had not disclosed the execution of the Will either to her or to other members of the family. Similarly, the 4th defendant, who is the eldest male member in the family, who has been examined as D.W.1, has also denied knowledge of the existence of the Will. According to him, he is unable to say whether the signature found in Ex.B-1 is that of his mother. It is therefore incumbent on the 5th defendant to prove the execution of Ex.B-1 as required under Section 63 of the Indian Successions Act regarding the due execution of the last will and testament by the deceased Kamalammal.

20. In this regard, besides his evidence, he has examined D.W.2, Seetaraman, an attester to the Will. The other attester namely Krishnaveni died after the date of the Will and therefore apart from the evidence of D.W.2 and that of the 5th defendant as D.W.3, there is no other evidence available on record to prove the execution of the same. Hence, the learned counsel for the plaintiff has drawn the attention of this Court to the decision, INDU BALA v. MANINDRA CHANDRA (AIR 1982 S.C. 133) wherein the Honorable Supreme Court has laid down the principle relating to the proof of Will as under:

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"The mode of proving a Will does not ordinarily differ from that of proving any other document except to the special requirement of attestation prescribed in the case of a will by Section 63 of the Succession Act. The onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine. Even where circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signatures of the testator, the condition of the testator's mind, the dispositions made in the will to show that the testator's mind was not free. In such a case, the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes a prominent part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances, the court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. Any and every circumstance is not a 'suspicious' circumstance. A circumstance would be 'suspicious' when it is not normal or is not normally expected in a normal situation or is not expected of a normal person."

21. A careful analysis of the evidence of D.W.2 Seetaraman who has attested the Will would disclose that he was not directly connected with the testator, namely, Kamalammal. According to him, he is related to Ramachandran, who is his uncle cultivating the land described under item 3 in 'A' schedule to the plaint as a tenant under Kamalammal. Though he would state that when Ex.B-1 Will was executed in his presence as well as in the presence of one Krishnaveni, who died later, he is unable to trace the exact relationship between himself and Ramachandran. Moreover as an employee in a private company, D.W.2 could not justify his presence on 30.10.1986 on which date Ex.B-1 was alleged to have come into existence. It is curious to note the evidence of D.W.2 that since it was a Sunday, he happened to go over to the place of

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Kamalammal. However, the date on 30.10.1986 did not fall on a Sunday, but it happened to be a working day for D.W.2 and therefore we are of the clear view that the learned Single Judge had rightly rejected his evidence on this count. As referred to above, besides the evidence of D.W.2, there is no independent evidence available on record to prove the due execution of the will by Kamalammal and therefore there is every reason to scrutinise the evidence of both D.Ws.2 and 3 with great care and caution in this regard.

22. On the whole, the evidence available on record would indicate clearly that Kamalammal was an independent person taking her decision even without consulting her children and therefore, the learned Single Judge was right in his observation that Kamalammal would not have chosen a stranger like D.W.2 while making disposition of her properties by way of executing the said Will. Further it is observed by the learned Single Judge that D.W.2 does not know the children of Kamalammal and has no occasion to attend their marriages or any festival in the family. Therefore learned Single Judge was right in our opinion to hold that his testimony does not inspire confidence in this regard. After analysing the totality of evidence of D.W.2, the learned Single Judge found rightly in our opinion that D.W.2 would not have been present at the time of the alleged execution of Ex.B-1, the Will and that he obliged the 5th defendant to depose in support of his case.

23. However, the learned counsel for the plaintiff and contesting defendants have also pointed out the following suspicious circumstances surrounding the execution of Ex.B-1, the will. The first and foremost circumstance pointed out by them is that the stamp papers for engraving the Will had been purchased from a vendor at Watrap in Ramanathapuram District only on 29.10.1986 and there is no reason for the deceased Kamalammal to purchase the stamps from a place which is more than 300 miles away from Madras on the previous day of the execution of the document. Similarly, according to D.W.2, it was about noon he signed as witness in Ex.B-1. It is evident that Kamalammal never left Madras during her last days. Hence, the learned counsel for the contesting plaintiff and defendants have in our opinion raised a pertinent question as to how Kamalammal could have purchased stamp papers for writing an important document such as Will from a stamp vendor from a far away place on the previous day. In the absence of any evidence to explain the above suspicious circumstance adduced on the part of the 5th defendant, it cannot be said that he has discharged the onus of proof as adumbrated in the ratio laid down by the Apex Court in the decision referred to above. The above circumstance shrouded with suspicion has not been explained by the 5th defendant and hence, we are constrained to endorse the

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finding rendered by the learned Single Judge on this aspect of the matter.

24. Further, it is important to note that even though the will Ex.B-1 was type-written, no particulars of the person who typed it had been mentioned therein. Hence, it is rightly contended by the learned counsel for the contesting parties to the suit that in addition to the above circumstances, the non-mentioning of the name and address of the person who typed the document would go to show and prove that the Will propounded by the 5th defendant is not a true and genuine document.

25. Moreover, as has been rightly argued by the contesting parties, the bequeath under Ex.B-1 is not beyond suspicion for the simple reason that all the immovable properties belonging to Kamalammal, namely, item Nos.2 to 4 were bequeathed in favour of 3 sons and that 2/3rd share in the jewels belonging to her must go to the female children among three sons. It is pertinent to note that the 6th defendant had no issues and the 4th defendant had only two male children and it is the 5th defendant who alone has a girl child. Hence, it goes without saying that the said document had been cunningly drafted at the instance of the 5th defendant so as to get 2/3rd share in the jewels bequeathed in favour of his daughter. It follows that the above circumstance is also suspicious one which has not been explained satisfactorily by the propounder of the will, namely, the 5th defendant herein.

26. Though the learned counsel for the 5th defendant would rely upon the decision, S.SUNDARESA PAI v. SUMANGALA T.PAI (AIR 2002 S.C. 317) that even if some of the heirs are excluded in the legacy under the will, it is not a suspicious circumstance. However the facts involved in the said case are such that the ratio laid down therein cannot be made applicable to the case on hand for the simple reason that the Will in question in that case, had been proved to have been executed by the testator in a sound and disposing state of mind and the only question involved therein was about the uneven distribution of assets among the children which by itself held to be not a suspicious circumstance surrounding the execution of the Will. On the contrary, in this case, the daughters of Kamalammal are not getting any share in the immovable properties, namely, item Nos.2 to 4 to plaint 'A' schedule and also in the jewels left by Kamalammal, only the three sons were bequeathed with immovable properties and 2/3rd share in the jewels to the girl child of the 5th defendant to the exclusion of other heirs. It is in these circumstances, we are constrained to hold that the ratio laid down in the said decision does not advance the case of the 5th defendant in any manner. It follows necessarily that even the bequeath under Will Ex.B-1 creates the

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strong suspicion which has not been dispelled by the 5th defendant as narrated above.

27. It is in the evidence of D.W.1, 4th defendant that the mother Kamalammal never told him that she executed a Will and that he is unable to say whether the signature found in Ex.B-1 is that of his mother. Further according to him, his mother was an illiterate, but she used to sign her name in Tamil by putting her initial in English and yet he is unable to state definitely whether the signature found in Ex.B-1 is that of his mother. It is the admitted case of both sides that Kamalammal died on 24.11.1986. It is in the evidence of D.W.1 that he visited his mother 1-1/2 months prior to her death and she had not informed about the execution of the Will at that time. In the above circumstances, apart from the evidence of the 5th defendant as D.W.3, there is no other evidence worth mentioning to prove the due execution of Ex.B-1 by Kamalammal. Hence, the learned Single Judge came to the irresistible conclusion that in the absence of proper explanation as to the custody of Ex.B-1 with the 5th defendant, the said document cannot be said to be true and genuine.

28. The above conclusion of the learned Single Judge is affirmed by the conduct of the 5th defendant in not sending a reply notice, though he received notice Ex.A-1 issued by the plaintiff demanding partition and separate possession of her share in the suit properties and if really, the Will Ex.B-1 was in existence, the normal conduct of the 5th defendant would be to send a reply immediately, refuting the claim of the plaintiff by mentioning the existence of the Will, Ex.B-1. Per contra, his inaction in this regard would go to show and prove that nearly after a period of 10 years only, the 5th defendant came forward with the story of the Will under Ex.B-1 so as to give credence to his false statement as to the execution of the Will. For the reasons stated above, we are inclined to agree with the finding rendered by the learned Single Judge in this regard and answer the issue Nos.(ii) and (iii) against the 5th defendant, namely, appellant in these appeals.

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29. Thus, we record a finding that the said Will dated 30.10.1986 is not executed by Kamalammal in a sound and disposing state of mind as claimed by the appellant herein, that therefore, the testamentary disposition made under the Will regarding the suit item Nos.2 to 4 to the plaint 'A' schedule is not true and valid and that consequently, the 5th defendant is not entitled to any letters of administration in respect of the said Will.

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30. It is in the evidence of the case that the 3rd defendant was mentally ill till her death in 1997 and she was looked after by the 5th defendant subsequent to the death of Kamalammal in 1986. It is admitted by the plaintiff as P.W.1 as well as by the 4th defendant as D.W.1 that the 3rd defendant who was mentally ill had been residing with the 5th defendant after the death of the mother Kamalammal and that the wife of the 5th defendant took care of the 3rd defendant. Similarly, the 5th defendant as D.W.3 has stated in his evidence, that after the death of the mother Kamalammal, his elder brother 4th defendant admitted the mentally retarded sister, 3rd defendant to mental hospital and that since he did not approve of such admission to hospital, he got the 3rd defendant discharged from the hospital and took her to his house for subsequent care and treatment. In view of such evidence, the learned counsel for the 5th defendant has pointed out and in our opinion rightly that on account of the extra expenditure incurred by the 5th defendant in taking care of the mentally retarded sister, 3rd defendant for more than 10 years, on equitable consideration, he has to be allotted the residential house item No.2 described in the plaint 'A' schedule as well as few cents more in item No.3 over and above the extent to which he is entitled towards his 1/6th share therein.

31. Having regard to the totality of the evidence and the circumstances that the 5th defendant and his wife had taken parental care of the mentally ill person, namely, his sister 3rd defendant (since deceased) for about 11 years, we are of the considered view that in equity, the 5th defendant may be allotted item No.2, house property described in plaint 'A' schedule and 50 cents in the land described under item No.3 to 'A' schedule and remaining items may be allotted to the plaintiff and the defendants 1, 2, 4 and 6. Similarly, the plaintiff and the defendants may each be allotted 1/6th share in the suit 'B' schedule jewels. The finding recorded by the learned Single Judge that the movables mentioned in 'C' and 'D' schedule to the plaint schedule are not available for partition is not challenged. It is in these circumstances, we hold that the defendant is entitled to the equity in the allotment of properties in the final decree proceedings as mentioned above.

32. This Court, while confirming the judgment rendered by the learned Single Judge, is inclined to modify the preliminary decree passed earlier in the following terms:-

> There shall be a preliminary decree that in view of the equitable consideration referred supra, the appellant/5th defendant in the suit is entitled to item No.2, house property described in the 'A' schedule to the plaint and also 50 cents in item No.3, cultivable

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land out of the total extent of 2.20 acres described in schedule 'A' to the plaint towards his 1/6th share in the suit 'A' schedule property and that the respondents/plaintiff and the defendants 1, 2, 4 and 6 are each entitled to 1/5th share in item No.1, item No.3 cultivable land to an extent of 1.70, acres out of 2.20 acres and item No.4 in the schedule 'A' to the plaint and that the appellant/5th defendant and the respondents/plaintiff and defendants 1, 2 and 4 and 6 are each entitled to 1/6th share in the suit 'B' schedule movable properties. However, the appellant and respondents 2, 3 and 5 shall pay the court fees due in respect of their shares at the time of passing final decree.

Subject to the above modification in the preliminary decree, the judgment rendered by the learned Single Judge of this Court is confirmed and the appeals are disposed of accordingly. In the circumstances, the parties are directed to bear their respective costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Sub Asst. Registrar,
Original Side, High Court, Madras.

2. The Record Keeper, VR Section, High Court, Madras.

One cc to Mr.V.Umapathy, Advocate SR.48989.

One cc to Mr.R.Raghavan, Advocate SR.48990.

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